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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MICKEY STEWART,

Defendant and Appellant.

A104769

(Alameda County
Super. Ct. No. C142397)

Defendant was convicted of one count of forcible rape (Pen. Code, § 261, subd. (a)(2)). He was sentenced to the midterm of six years in state prison. The sole issue on appeal is whether the trial court erred by excluding evidence relating to prior allegations of domestic violence by and against the victim, involving an individual other than defendant. We find no error and affirm.

I.
BACKGROUND

The victim, Julia Doe, and her friend, Shanae Knight, went to the On Broadway bar in Oakland on the night of January 3, 2002. The victim saw defendant there and spoke to him. She knew him as a childhood friend. They hugged, but did not kiss. The victim regarded defendant as a friend, but was not sexually attracted to him. While the victim and defendant were on the dance floor at the same time on at least one occasion, they did not dance face to face and their bodies did not touch. They exchanged telephone numbers so they could reestablish their friendship.

When the victim and her friend left the bar at approximately 1:30 a.m., defendant indicated that his friends had left him. The victim offered defendant a ride. After picking up Shanae's daughter, they went by defendant's apartment. He checked his apartment, but no one was there. He got back in the car. They then went to a burrito truck on Seminary Avenue to get some food. The victim made arrangements by cell phone for her ex-husband to drop their daughter at her house at 3:00 a.m. The victim was ticketed for running a red light; the officer removed her license plate tags after learning that they were false.

The victim dropped Shanae and her child at their home. The victim and defendant returned to his home to see if anyone was there yet. He checked to see if anyone was home while she waited in the car. He returned, got in the passenger seat and took the victim's car keys. They argued for some 30-40 minutes and the victim pleaded with defendant to return her car keys so she could go home and give her daughter her asthma medicine. Defendant then got in the driver's seat and indicated that he was taking the victim's car. He complained that she made him leave the bar and that she would "have to do something."

Although defendant indicated he would take the victim home, he turned the wrong way on International Boulevard. He continued to say that the victim was going to have to do something. Defendant pulled over on 49th Avenue and began to touch his private parts. He repeated that the victim was going to have to do something. When she asked to be released so that she could see her children, he replied that "you don't need to see your kids." The victim froze and did not fight defendant; she told him that if he wanted to "kick it" with her, that it was fine but she needed to go home first. Defendant grabbed the victim's arm and flipped her over. He unfastened her jeans, squeezed her neck, and penetrated her from behind. He did not use a condom. The victim never told defendant that she wanted to have sex with him and there was no fondling before he penetrated her. She did not, however, fight him and felt that she should just let it happen and get it over with so she could get home. She was crying the entire time and begged him to let her go home to her children.

The victim told defendant that she was unable to lubricate and that having sex was not working. Defendant backed off the victim. She obtained the car keys and started the car, but he again grabbed the keys. The victim fled the car and contacted two men who were on the street. She indicated that she had been raped and they told her to call the police. The victim went to a telephone booth nearby and called 911. The police arrived within a minute and arrested defendant. They took the victim to the hospital, where she was examined. The exam disclosed a hymenal tear and the findings of the examination were consistent with nonconsensual sex. An expert witness, a physician's assistant, testified that she had never seen a tear similar to that of the victim in anyone who had engaged in consensual sex. The victim also had a two-centimeter bruise on her neck, which was consistent with having pressure applied to that area.

One of the men that the victim approached on the street, Marcel Jackson, testified that the victim was upset and crying and that she said she had been raped. The strap of her shirt was down and her pants were unbuttoned. He testified that defendant walked up to him and said that the victim was lying. Defendant then went to the pay phone where the victim was calling the police and hung up the telephone, saying that what she was claiming was not true. Defendant denied raping the victim at least two times. The other man that the victim had approached, Enersto Jerez, testified that the victim was crying and asked if he could stay with her until the police arrived to make sure that nothing happened. She indicated that she had been raped.

Police officers who arrived at the scene described the victim as upset and hysterical. One found the victim's car keys in defendant's pocket. Defendant told the officers that he and the victim had had sex, but that it was consensual. The victim was 4 feet 10 inches tall and weighed 125 pounds when the crime occurred; defendant was 6 feet tall and weighed approximately 230 pounds.

Defendant testified that the victim approached him at the On Broadway bar and they danced. She pressed her buttocks against him and put her arms around him and he touched her. They exchanged telephone numbers. He asked her to come back to his place; he never said anything about not having a ride. They were flirting in the car. After

Shanae was dropped off, the victim drove him to his house. She said she was not coming in as she had to meet her ex-husband and get her daughter. He removed the keys from the ignition and asked her to come in. She indicated that while she could not because she had to meet her ex-husband, she wanted to “hook up” and “kick it” with him. He understood that to mean that she wanted to have sex with him.

Defendant also testified that he thought the victim wanted to have sex, but that time was a factor. He did not want her to leave and wanted her to change her mind. After defendant’s roommate returned home, the victim refused to go into the apartment. Defendant said that he knew somewhere else they could go. He got in the driver’s seat. He denied agreeing to go to her place, making any statements about her children, or that she ever said that she was not going to have sex with him. According to defendant, the victim was concerned that they did not have much time since she wanted to meet her ex-husband and did not want him to be upset. After defendant unbuttoned his pants and said he was ready, the victim got on her knees by herself. She asked if he had a condom. She was not crying and told him to hurry as she was running late. She never tried to stop him or to resist. If he touched her neck at all, it was while they were having sex. He described it as “rough sex.” When the victim indicated they were running out of time and needed to stop, he stopped. The victim got out of the car and while defendant was pulling up his pants he said, “let’s finish.” She indicated that she could not. She was upset, but not crying. Defendant testified that he would not have sex with a woman who was crying as it was “sick,” and he would have lost his erection. Although defendant admitted that after hearing the tape of victim’s 911 call and her testimony at trial it was clear that she did not want to have sex, at the time he thought she wanted to.

The victim only became angry after defendant suggested they finish having sex. He got out of the car and took her keys; he refused to return them when she asked. He began to walk down the street toward East 12th. He noticed that she was walking the other direction, toward International Boulevard and he walked back to return her keys. A man who was there indicated that the victim said that defendant raped her. Defendant denied doing so.

On cross-examination defendant admitted that the victim asked for her car keys several times. Even though he told her that he knew where they could go, he admitted that he did not have a clue where he was going. He said the victim became lubricated during the sex act and complimented him on his love making abilities. He was angry because he felt that she had wasted his time. He admitted keeping the victim almost an hour past the time she was supposed to meet her ex-husband.

Defendant was charged with a single count of forcible rape, proceeded to jury trial, and was convicted. He was sentenced to six years in state prison. This timely appeal followed.

II. DISCUSSION

Defendant contends on appeal that the trial court erred in excluding his proffered evidence relating to an alleged past incident of domestic violence by the victim against her ex-husband and an alleged false report by her concerning domestic violence perpetrated by her ex-husband, thereby denying his constitutional right to cross-examination and to present a defense. The prosecution moved in limine to exclude evidence of, or reference to, a domestic violence incident that allegedly occurred in August of 2001. The police report of this incident indicated that the victim and her ex-husband had been drinking and arguing and the victim hit her ex-husband on the face several times, with a closed fist. He had a large amount of swelling under one eye and a small cut in the same area. The incident was witnessed by a third individual. Defendant indicated that he wished to cross-examine the victim about this incident as it was a misdemeanor involving moral turpitude and would bear on her credibility. He also argued that her conduct with her ex-husband was relevant on the issue of whether she was able to fend off unwanted sexual advances by defendant. The court ruled that since the victim's ex-husband would not even give a statement to the police about the incident, there was insufficient evidence that an act of domestic violence had been perpetrated by the victim. As to defendant's second argument, the court rejected the proffered

relevancy, unless the victim opened the door by testifying that she had never hit a man before, etc. Later the court denied defendant's request to question the victim's ex-husband about the same incident.

The court also prevented defendant from asking the ex-husband questions concerning whether or not the victim had filed false police reports regarding alleged incidences of domestic violence by her ex-husband in the past. Defense counsel was relying on a prior police report of an incident of domestic violence by the victim's ex-husband against her. In that report, although the ex-husband admitted tearing the victim's clothes off, he said that she was falsely accusing him and that she had filed false police reports in the past. The ex-husband, however, later entered a plea to the charges that were the subject of that police report and was on probation for domestic violence as a result. The court further noted that the defense had presented no further information about other alleged false police reports filed by the victim, other than this vague reference by her ex-husband in his defensive statement to the police in this police report.

While a defendant makes out a violation of the confrontation clause of the Sixth Amendment by demonstrating that he was prohibited from engaging in appropriate cross-examination designed to demonstrate bias on the part of a witness (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680), not every restriction on a defendant's cross-examination is a constitutional violation. The court in *People v. Frye* (1998) 18 Cal.4th 894, 946, encapsulated the relevant principles governing claims of denial of the right to confrontation by limiting cross-examination, stating: “ ‘[A] criminal defendant states a violation of the Confrontation Clause [of the Sixth Amendment to the United States Constitution] by showing that he was prohibited from engaging in otherwise appropriate cross-examination’ ” (*Delaware v. Van Arsdall* [*supra*,] 475 U.S. 673 [at p.] 680, quoting *Davis v. Alaska* (1974) 415 U.S. 308, 318.) However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.]” Thus the trial court

retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 678-679.) Unless a defendant can demonstrate that the prohibited cross-examination would have produced “ ‘a significantly different impression of [the witnesses’] credibility’ [citation], the trial court’s exercise of its discretion in this regard does not violate the Sixth Amendment.” (*People v. Frye*, *supra*, 18 Cal.4th 894 at p. 946.)

Although past criminal conduct that involves moral turpitude is admissible in California even though it does not result in a felony conviction, the court still has the discretion to limit such evidence under Evidence Code section 352, if its prejudicial effect outweighs its probative value, or due to undue consumption of time or confusion of issues. (*People v. Wheeler* (1992) 4 Cal.4th 284.) That is precisely what occurred here. As the court below stated, “At some level, there may be some relevance to it, but the relevance spins off when you put it in context, and then we get into a whole marriage [¶] . . . [¶] That’s not what we are supposed to be doing in this case. This has nothing to do with marriage assault claims; nothing before me has anything to do with the slightest—with that.” We agree. Given the weakness of the proffered evidence, its very limited probative effect, its great potential for prejudicial effect, and the undue consumption of time and confusion of issues that would result, the court was well within its discretion in excluding evidence of the prior alleged act of domestic violence by the victim.

As to the prior alleged false reports of domestic violence by the victim, the same analysis attaches. The evidence would have had only slight probative value in the case at hand, and the potential for prejudicial effect and undue consumption of time, to say nothing of confusion of issues, was great. No support of the allegations of false reports was forthcoming by the defense, other than the ex-husband’s claim in a police report alleging he committed domestic violence, a charge to which he later entered a plea. Defendant has failed to demonstrate that either area of cross-examination would have produced “a significantly different impression of [the victim’s] credibility”

(*People v. Frye, supra*, 18 Cal.4th at p. 946.) We find no error in the trial court's preclusion of either area of cross-examination.

III. DISPOSITION

The judgment is affirmed.

Sepulveda, J.

We concur:

Reardon, Acting P.J.

Rivera, J.